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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1148

In the matter of the APPLICATION OF CHERYL SPIDER DECOTEAU, natural mother and next friend, and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a WRIT of HABEAS CORPUS,

Petitioner,

v.

THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH DAKOTA

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I.

THE OPENING OF THE LAKE TRAVERSE RESERVATION DOES NOT PRESENT A SITUATION THAT COMPELS ITS DISTINCTION FROM OR AN OVERRULING OF *SEYMOUR* AND *MATTZ.*

Respondent asks this Court to overrule *Seymour v. Superintendent,* 368 U.S. 351 (1962), and *Mattz v. Arnett,* 412 U.S. 481 (1973). B.R. at 175-179, 188.

Essentially, Respondent argues that allotment and sale of unallotted lands terminates the reservation. B.R. at 10-11, 59.

In the period following the General Allotment Act, Act of February 8, 1887; c.119, 24 Stat. 388, Federal Indian policy was directed toward the severance of tribal relations and the reduction of reservations. Respondent painstakingly attempts to set the Act of March 3, 1891; c.543, 26 Stat. 989, 1035, into this historical context. Respondent argues that since many reservations or portions thereof, affected by statutes which opened them to non-Indian settlement, were disestablished, the Lake Traverse Reservation must have been similarly terminated under the 1891 Act. B.R. at 57-113; B.R. App.II. No analysis of the 1891 Act, its surrounding circumstances, legislative and administrative history is presented to support this interpretation of the Act. Respondent's argument is unpersuasive.

1. Recent Congressional Recognition of The Reservation. In the Act of October 25, 1972; 86 Stat. 1168, Congress provided for the distribution to the Sisseton and Wahpeton Tribes of Sioux Indians of an Indian Claims Commission judgment. B.P. at 38. The Senate Report accompanying S.1462, the bill which became the 1972 Act, states: "The Lake Traverse Reservation is a V-shaped area lying in the northeast corner of South Dakota with a small portion of the reservation in the southeast corner of North Dakota.... The town of Sisseton ... is located in the approximate center of the triangular reservation." S. Rep. No. 92-144; 92d Cong., 1st Sess. at 8 (1971).[1] Contradicting Respondent's con-

[1] This Report is replete with present-tense references to the Lake Traverse Reservation. S. Rep. No. 92-144 at 2, 4-6, 8-10, 12-13. The House Report on H.R. 6067, a Sisseton-Wahpeton

[footnote continued]

tention that the trust allotments on the "former" Lake Traverse Reservation are situated on the public domain, B.R. at 57, 73,[2] the Report notes that "the trust allotted lands are checkerboarded over the entire reservation." S. Rep. No. 92-144 at 9.

Congress recently reaffirmed its consistent recognition of the Lake Traverse Reservation. The Act of October 26, 1974; 88 Stat. 1468, "authorize[s] the Sisseton and Wahpeton Sioux Tribe of the Lake Traverse Reservation to consolidate its land-holdings" through the acquisition of any lands "within the boundaries of the Lake Traverse Reservation in North Dakota and South Dakota. . . ."[3] The Senate Report accompanying S.1411, the bill which became the 1974 land acquisition Act, states: "The reservation is V-shaped and lies in the northeast corner of South Dakota, with a small portion in the southeast corner of North Dakota." S. Rep. No. 93-832; 93d Cong., 2d Sess. at 2 (1974).[4] See, B.P. at fn.28.

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claims award distribution bill which passed the House and was vacated in favor of S. 1462, contains similar references to the Lake Traverse Reservation. H. Rep. No. 92-1369; 92d Cong., 2d Sess. at 7, 9 (1972).

[2] Respondent raises this argument for the first time in this Court, having argued below that the Lake Traverse Reservation exists and consists only of the trust allotments. R.B. below at 10-11, a position adopted by the Court below, ____ S.D. ____, 211 N.W.2d 843, 846 (1973).

[3] If the State has jurisdiction on the Lake Traverse Reservation, Congress by this law has approved increased checkerboarding, an unlikely Congressional intent. The Tribe has recently negotiated a $1,000,000 FHA loan to implement this Act.

[4] The House Report on H.R. 8230, a Sisseton-Wahpeton land acquisition bill comparable in all significant respects with S. 1411, identically described the Lake Traverse Reservation. H. Rep. No. 93-1356; 93d Cong., 2d Sess. at 3 (1974).

Another Act of October 26, 1974; 88 Stat. 1465 declared that certain Federal "lands on the Lake Traverse Indian Reservation in North and South Dakota" be held in trust for the Sisseton-Wahpeton Sioux Tribe. The Senate Report accompanying S.1412, the bill which became this 1974 Act, identifies four tracts of land "located within the exterior boundaries of that portion of the Lake Traverse Reservation located in the State of South Dakota." S. Rep. No. 93-909; 93d Cong., 2d Sess. at 2 (1974).[5] The Report states that "the predominately non-Indian town of Sisseton . . . lies in the heart of the Lake Traverse Reservation."[6] *Id.* See, B.P. at fn.28. It is for acts allegedly and primarily committed in the town of Sisseton that Respondent here and Petitioner in *Erickson v. Feather,* No. 73-1500, asserts its claim to jurisdiction on the assumption that Sisseton is not Indian Country.

The Lake Traverse Reservation boundaries are today identical to those established by the Treaty of February 19, 1867, 15 Stat. 505.[7] The 1972 and 1974 acts of Congress are consistent only with this position. See, *Seymour v. Superintendent, supra,* 368 U.S. at 356.

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[5]The House Report on H.R. 8229, a companion bill to S. 1412, also discusses the Lake Traverse Reservation in the context of its continued existence in 1974. H. Rep. No. 93-1355; 93d Cong., 2d Sess. (1974).

[6]*Foot Prints,* a Brown's Valley, Minnesota newspaper in a May 1, 1892 story observed that "Sisseton . . . will be the leading town on the [Lake Traverse] Reservation." Brown's Valley is situated on the western boundary of the Reservation.

[7]The Act of March 2, 1895; c.188, 28 Stat. 889, also refers to the "Sisseton Reservation." See also, S. Ex. Doc. No. 39; 53d Cong., 3d Sess. at 2 (1895). Although Respondent claims that the official maps of the Department of the Interior failed to depict the Lake Traverse Reservation after 1891, B.R. 113-116, an 1897 official Department map, on the disposition of Sisseton-

[footnote continued]

2. **"Former Reservation" Documents.** Respondent refers this Court to 9 letters from Interior Department archives which mention the "former" Lake Traverse or Sisseton and Wahpeton Reservation. B.R. at 9, B.R. App. I at 1-13. The Commissioner of Indian Affairs is the highest official cited by Respondent to express this characterization of the Lake Traverse Reservation. Three of Respondent's letters were written by the Commissioner. B.R. at 9, excerpts 4, 6 and 9.[8] It is clear that all the letters used the term "former" as merely descriptive of the reservation lands opened for settlement.[9] The Presi-

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Wahpeton Sioux tribal lands under various treaties and agreements, shows the Reservation. The map is attached to S. Doc. No. 68; 55th Cong., 2d Sess. (1898) and contains no inscription indicating changed reservation boundaries as a consequence of the 1891 Act. See, B.P. at 43, fn. 31.

[8] Respondent's excerpts 4 and 6, B.R. at 9, are quoted out of context; the full letters are susceptible of an interpretation of the word "former" consistent with an undiminished reservation. B.R. App. I at 6 and 13. Excerpt 2, B.R. at 9, is from a form letter that was not prepared by its Sioux-speaking signatory and cannot be interpreted as expressive of the thinking of tribal members. Form letters signed by tribal members, and obviously prepared by the Indian Agent at Sisseton, evidence a tribal and Interior Department understanding that the reservation was not diminished or disestablished by the 1891 Act. B.P. at fn.17, B.P. App. at 46. Excerpt 3, B.R. at 9, is from a letter written by Henry S. Morris, the United States Special Allotting Agent on the Lake Traverse Reservation. Mr. Morris clearly believed that the 1891 Act had no effect on the continued existence of the reservation as defined in 1867. B.P. at 42, B.P. App. at 38-40. Excerpts 1 and 7, B.R. at 9, are letters from officials of the General Land Office, the office charged with the administration of the homestead laws. These letters use the word "former" as descriptive of the area opened for homestead settlement and express no intimation of reservation dissolution.

[9] This descriptive use of "former reservation" is highlighted by the Senate Report on the 1972 Sisseton-Wahpeton Sioux claims award distribution act which states that "four other State highways

[footnote continued]

dent, the Secretary of the Interior, and the Commissioner in letters and each Annual Report after 1891 repeatedly define the Lake Traverse Reservation boundaries in terms consistent with the 1867 Treaty. B.P. at 39-46; B.R. App. II at 94, 97, 124 (citing an 1897 Annual Report at p. 279 and omitting the reference to the undiminished Reservation at p. 280).[10] Unlike the Colville Reservation, no Congressional act affecting the Lake Traverse Reservation ever used the phrase "former reservation." *Seymour v. Superintendent, supra,* 368 U.S. at fn. 12; B.P. at fn.23. Department of the Interior actions and decisions have always affirmed the 1867 treaty reservation. B.P. at 36-46.

3. **The School Lands Grant.** Section 10 of the Act of February 22, 1889; c.180, 25 Stat. 676, South Dakota's

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cross the former [Lake Traverse] reservation." S. Rep. No. 92-144, *supra,* at 8. This language is included in a Report that only discusses the 1974 reservation as identical to the reservation established in 1867.

[10] In the same manner, Respondent quotes out of context from *Farrell v. United States,* 110 F. 942, 947 (CA 8 1901). B.R. at 172. The full quote supports Petitioner's position and states: "LaFramboise had received his allotment and patent, and the lands within the reservation of the Sisseton and Wahpeton bands of Sioux Indians, to which he belonged, that have not been alloted, have been opened to settlement under this act . . . . The unallotted portion of the reservation of his bands was opened to settlement on April 15, 1892 . . . ." 110 F. at 947. Respondent also incorrectly cites this Court's decision in *United States v. Pelican,* 232 U.S. 442 (1914) as "in effect" affirming *United States v. LaPlant,* 200 F. 92 (D.S.D. 1911). B.R. at 154. *Pelican* was concerned with the north half of the Colville Reservation, "vacated and restored to the public domain." *Seymour v. Superintendent, supra,* 368 U.S. at 355. Respondent further cites *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903), for a proposition not discussed in that decision. B.R. at 150. See also, Amicus Br. United States at 26, fn.8 for repudiation of Respondent's analysis of *United States v. Rickert,* 188 U.S. 432 (1903).

Enabling Act, grants sections 16 and 36 in each township to the State for common schools provided that, if said sections are embraced in any permanent reservations or Indian reservations, the reservation shall have been extinguished and the lands restored to the public domain. Respondent argues that in order to avoid any inconsistency between Section 10 of the Enabling Act and Section 38 of the Act of March 3, 1891; c.543, 26 Stat. 989, 1035, granting land sections 16 and 36 in the Lake Traverse Reservation to the State for common school purposes, Section 38 must be interpreted as an extinguishment of the Lake Traverse Reservation. B.R. at 132-140.

The legislative history of the 1891 Act reveals no reference to the Enabling Act. None of the critical language in Section 10 is repeated in the 1891 Act. Petitioner can offer two substitute constructions of Section 10 of the Enabling Act and Section 38 of the 1891 Act. (1) By Section 38 of the 1891 Act, Congress may have developed an alternative system, to Section 10 of the Enabling Act, that provided for school land grants within a continuing Indian reservation.[11] (2) Section 10 of the Enabling Act contemplated no more than an extinguish-

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[11] This construction gains credibility because Indian title was never extinguished. Sections 16 and 36 were never restored to the public domain as required by §10 of the Enabling Act. The Reservation was not disestablished. Still, the State was granted use of the sections for common schools. If the 1891 Act had not granted land sections 16 and 36 to the State, these sections would have remained Indian land. Amicus Br. United States at 21. *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). The Act of May 29, 1908, c. 218, 35 Stat. 460, §7, recognizes that there can be Indian allotments in sections 16 and 36, granted to South Dakota on the Cheyenne River Reservation. The school lands remain in an Indian reservation. *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (CA 8 1973).

ment of the reservation of definite lands embraced in an Indian reservation, e.g. sections 16 and 36, and not of the entire Indian reservation.[12] These constructions are at least as plausible as the one presented by Respondent. Respondent's Congressional Record citations are supportive of construction (2) above.[13] B.R. at 137-139. The legislative histories of the Enabling Act and the 1891 Act do not lay a clear foundation for either Petitioner's or Respondent's constructions. In view of the general legislative and historical record on the 1891 Act and the Lake Traverse Reservation generally, and

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[12] This provision also appears in the North Dakota Enabling Act of February 22, 1889; c.180, 25 Stat. 676. The Act of June 1, 1910, c.264, 36 Stat. 455, § 8 granted school lands to North Dakota. The Eighth Circuit held that this Act did not disestablish a portion of the Fort Berthold Reservation. *City of New Town, N.D. v. United States,* 454 F.2d 121 (CA 8 1972). Similarly, the Eighth Circuit held that the Cheyenne River Reservation was not disestablished by the Act of May 29, 1908, c.218, 35 Stat. 460. This Act granted sections 16 and 36 to South Dakota for school purposes. *United States ex rel. Condon v. Erickson, supra,* cited with approval by this Court in *Mattz v. Arnett, supra,* 412 U.S. at fn.23.

The Enabling Acts of Montana, Utah and Washington also contain the same provision as § 10 of the South Dakota Enabling Act. Act of February 22, 1889, c.180, 25 Stat. 676. Washington was involved in *Seymour v. Superintendent, supra,* where this Court found that a 1906 Act did not disestablish the Colville Reservation. Montana was granted sections 16 and 36 in the Flathead Reservation by the Act of April 23, 1904; c.1495, 33 Stat. 302, § 8. The Flathead Reservation was not disestablished as a result. *Confederated Salish and Kootenai Tribes v. Namen,* 380 F. Supp. 452, 457 (D. Mont. 1974).

[13] This construction is also supported by the House Report on the bill that became the Enabling Act. "It is provided in the bill that the sixteenth and thirty-sixth sections in these Indian reservations be not granted until the Indian titles are extinguished and the lands become a part of the public domain." H. Rep. No. 1025; 50th Cong., 1st Sess. at 8 (1888).

applicable rules of statutory construction, B.P. at 9-12, Section 38 of the 1891 Act did not extinguish the Lake Traverse Reservation.

Respondent's argument ignores this Court's rule of statutory construction that Congressional acts disestablishing a reservation must use express termination language. *Mattz v. Arnett, supra,* 412 U.S. at 505, fn. 22 (1973). "Vacated and restored to the public domain" is an example of the express language used by Congress to terminate reservations. Act of July 1, 1892; c.140, 27 Stat. 62; *Seymour v. Superintendent, supra,* 368 U.S. at 355-356. It is inconceivable that Congress would, by implication or innuendo, abolish the Lake Traverse Reservation through the general school lands grant provision in the 1891 Act. In the same 1891 Act, Congress demonstrated an ability to clearly state intent when it specifically "restored to the public domain" certain Coeur d'Alene lands. 26 Stat. 1031. If Congress did intend Section 38 to effect a dissolution of the reservation, the Department of the Interior never received the message. Since 1867, the Department has administered the permanent reservation area defined in the 1867 Treaty.

4. The Cession Language. Respondent argues that literally taken the broad divestiture language of cession in the 1891 Act disestablishes the reservation. B.R. at 119-126. The cession language cannot be taken literally. When the United States acts as trustee and credits the land sale proceeds to the Tribe, this Court has consistently held that Indian title is not extinguished by the cession language. *Morrison v. Work,* 266 U.S. 481 (1925); *Ash Sheep Co. v. United States,* 252 U.S. 159, 166 (1920); *Minnesota v. Hitchcock, supra,* 185 U.S. at 394-395; *United States v. Brindle,* 110 U.S. 688, 693 (1884). See

also, *Confederated Bands of Ute Indians v. United States,* 100 Ct. Cl. 413, 432 (1943); *Restoration to Tribal Ownership of Ceded Colorado Ute Indian Land,* 56 I.D. 330, 337-338 (1938); B.P. at 22, 55. See also Amicus Br. United States at 13, fn. 6, 14, 19-20; Brief Amici Curiae of Arapahoe Tribe, et al. in *Erickson v. Feather,* No. 73-1500; and B.R. 34, 40, 42, 45, for further repudiation of Respondent's "sum certain" – "outright cession" argument. See, B.R. at 61, fn. 13, *infra.* None of the statutes construed in the foregoing decisions involved absolute cessions. Respondent's error is the equation of absolute cessions with cessions under the General Allotment Act and others that contain a substantial trust element. B.R. at 59. Thus, quoting out of context, Respondent compares cession language in various Sisseton-Wahpeton treaties and agreements. B.R. at 121-123. The Treaty of July 15, 1830; 7 Stat. 328 (B.R. at 121, excerpts 1 and 2), draws specific boundary lines delineating the area excluded from tribal hegemony. The Tribe's rights to the lands it retained are stated. By the Convention of November 30, 1836; 7 Stat. 527 (B.R. at 121, excerpt 3), the Tribe effected an "entire and absolute disposition of the said lands fully authorizing the United States to do with same whatever shall seem expedient or necessary." The Treaty of July 23, 1851; 10 Stat. 949 (B.R. at 121, excerpt 4), described specific boundaries and stated that the Tribe would remove itself from the ceded area. The Act of June 24, 1874; 18 Stat. 167 (B.R. at 122, excerpts 6 and 7), amended the 1867 Treaty, particularly describing lands to be "ceded absolutely." B.P. at 14. It is clear from each of the pre-1891 cessions that the Tribe was in fact agreeing to extinguish its title to certain lands. These pre-1891 cessions are not comparable in any respect to the 1891 "cession," made pursuant to the General Allotment

Act.[14] *Mattz v. Arnett, supra,* 412 U.S. at 496; B.P. at 36-37. Those sections of the 1891 Act pertaining to the Lake Traverse Reservation, viewed in their entirety contain no termination language and lend no

[14] Respondent reprints numerous references from the legislative history of various cession agreements and the Annual Reports of the Commissioner of Indian Affairs and the Secretary of Interior describing a multitude of tribal land cessions, reservation abandonments and tribal removals contemporaneous with 1891, and all, according to Respondent, resulting in the transfer of Indian lands to the public domain. B.R. at 51-113, 124-145, 147b; B.R. App. II at 1, 5-7, 10, 18, 21, 22, 30, 36, 44, 48, 50-53, 56, 68, 101, 102, 106, 108, 115, 118, 121, 125, 141, 142, 150. Although Respondent concedes that each agreement with a tribe must be taken on its own facts and legislative history, B.R. at 118, 177, these documents are presented as representing situations comparable to the Lake Traverse Reservation opening. When read in context, the cessions discussed used express language of reservation termination. Unlike the "cessions" in *Seymour* and *Mattz*, none of these cessions employed the General Allotment Act to open surplus lands to settlement and consequently not diminishing the reservation. An example is the Agreement with the Crow Tribe, Act of March 3, 1891; c.543, 26 Stat. 1039, highlighted by Respondent. B.R. 51-61. The Agreement specifically described the ceded area, 26 Stat. 1040, and referred to the remainder as the "retained reservation." 26 Stat. 1041. Unlike the Lake Traverse opening, there is provision for a survey. 26 Stat. 1042. The 1891 Fort Berthold Reservation Agreement, 26 Stat. 1032, contains virtually identical provisions, and includes a specific grant of jurisdiction to the Dakota Territory. In fact, the Lake Traverse Reservation is the only reservation in the 1891 Act to have settlement of surplus lands within an undiminished reservation under the General Allotment Act.

Contrary to Respondent's belief, B.R. at 55-57, there is no distinction between acts which terminate a discrete portion of a reservation and those which terminate the entire reservation. In either case, Congress clearly expresses its intent with regard to the consequences of the act for continued reservation existence. B.P. at 16, fn.8; B.R. at 170-171. Certainly if an entire reservation were to be abolished, Congress would make more than an inferential statement of this intent in a school lands grant provis-

[footnote continued]

substantiation for the position that the Reservation or any portion thereof was abolished, nor do the post-1891 enactments. B.P. at 36-38; see pp. 2-4, *supra*.

5. South Dakota Rejected Jurisdiction Over Indians. South Dakota was admitted into the Union as a State on the express condition that its people do "agree and declare . . . [that] Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . ." Enabling Act of February 22, 1889; 25 Stat. 676; S.D. Comp. Laws. Ann. Vol. 1 at 183 (1967); S.D. Const. Art. XXII. South Dakota has never had civil jurisdiction on Indian reservations. During the 1890s Congress agreed to give South Dakota criminal jurisdiction on Indian reservations. In 1901 South Dakota ceded this jurisdiction back to the United States, Laws of S.D. chs. 105-106 (1901), and the United States accepted. Act of February 2, 1903; c.351, 32 Stat. 793; Act of March 4, 1909; c.321, 35 Stat. 1151-1152. Neither South Dakota nor Congress have changed the absolute jurisdiction of the United States and the tribes over Indians in Indian Country.

If the law authorized State jurisdiction in Indian Country, there would have been no need for the standing invitation of the United States for the State to assume jurisdiction over Indians in Indian Country, without the con-

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ion. See, pp. 6-9 *supra*. The lack of explicit or any termination language in the Lake Traverse Reservation opening can only be interpreted as a Congressional intent to continue the Reservation. Respondent's discussion of the Crow Agreement only serves to emphasize the differences, not the similarities, between it and the Lake Traverse Reservation Agreement. In *Seymour* and *Mattz*, *all* the unallotted lands on the reservations involved were opened for non-Indian settlement. Contrary to the holding of this Court in those cases, Respondent would argue that the reservations involved were abolished with the Indian allotments consequently checkerboarded on the public domain.

sent of the Indians under the Act of August 15, 1953; c.505, § 7, 67 Stat. 588, and with the consent of the Indians under the Act of April 11, 1968; § § 401(a), 402(a), 82 Stat. 73, 78, 79, 25 U.S.C. 1321(a).

Pursuant to the authority of the 1953 Act, South Dakota that year adopted S.D. Comp. Laws Ann § § 1-1-12 to 16 giving South Dakota criminal and civil jurisdiction over Indian lands provided the additional costs could be passed on to the Federal Government. *In re High Pine's Petition,* 78 S.D. 121, 99 N.W.2d 38 (1959), held these statutes inoperative since the conditional terms were not accepted by the Federal Government. The statutes were repealed. S.D. Comp. Laws Ann. § 1-1-20 (1967). In 1961, South Dakota again attempted to obtain jurisdiction. S.D. Comp. Laws Ann. § § 1-1-18 to 21 (1967). The statutes never became effective because the Governor's consent and Federal assumption of costs required by S.D. Comp. Laws Ann. § 1-1-21 (1967) were never obtained. *In re Hankin's Petition,* 80 S.D. 435, 125 N.W.2d 839 (1964). South Dakota's last legislative attempt to obtain jurisdiction came in 1963. S.D. Sess. Laws, c.467 at 522 (1968). This attempt was voided by popular referendum in 1964. S.D. Comp. Laws Ann., Table of Omitted Provisions, Vol. 1 at 969 (1967). South Dakota has likewise not obtained jurisdiction under the 1968 Act since the adult enrolled members of the Sisseton-Wahpeton Sioux Tribe have never held an election to grant jurisdiction to the State.

South Dakota had 15 years, 1953-1968, to assume a full measure of jurisdiction over trust and non-trust lands in Indian Country. Checkerboarding could have been avoided. Failing to assume jurisdiction, the State now wishes to prevent the United States from exercising a full measure of jurisdiction. The State does not want the United States to have jurisdiction on non-trust lands

within the Lake Traverse Reservation, thereby creating extensive checkerboarding without warrant. The State has never lawfully acquired jurisdiction over Lake Traverse Reservation lands and should not now be allowed to obtain jurisdiction in an unauthorized manner that circumvented the law. An interpretation of the 1891 Act that gives the State jurisdiction not only thwarts the interests of the Sisseton-Wahpeton Sioux and the United States, but is directly contrary to the will of the people of South Dakota as expressed in the 1964 referendum.

II.

THE LEGISLATIVE AND JUDICIAL HISTORY OF THE ALLOTMENT PERIOD, 1890-1910, SUPPORTS THE CONCLUSION THAT THE LAKE TRAVERSE RESERVATION WAS NOT DISESTABLISHED OR DIMINISHED BY THE ACT OF MARCH 3, 1891.

In many respects the treatment of Indian tribes by the United States circa 1900 may not be praiseworthy. A close reading of the transcripts of the last two of the five council sessions that the commissioners held with the Sisseton and Wahpeton Sioux reveals that the Tribe was probably strong-armed into opening the Lake Traverse Reservation. S. Ex. Doc. No. 66; 51st Cong., 1st Sess. 23-29 (1890). By allowing those ravenous for lands to settle in its midst, the Tribe certainly never considered that it was abandoning its way of life, a life dependent on the existence of the reservation subject to federal protection and free from state jurisdiction.[15]

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[15] Respondent refers to selected excerpts from an 1889 Minneapolis Tribune story, B.R. at 7, 17-18; B.R. App. I at 19, and from transcripts of the 1889 negotiations for the opening of the Reservation. B.R. at 20-26, 126. Respondent cites these materials as dispositive of Congressional intent to disestablish the Reservation

[footnote continued]

Respondent argues in essence that this Court in *Seymour* and *Mattz* and the Eighth Circuit in *New Town Condon* and *United States ex rel. Feather v. Erickson*, 489 F.2d 99 (CA8 1973) are allowing a post-1960 historical moral judgment of the 1890-1910 period to intrude on an objective analysis of what actually transpired during the allotment period. B.R. at 15. Respondent spins an elaborate web of documentation to demonstrate that the Court today has been rewriting the history from 1890 to 1910. B.R. at *passim*.

Respondent's argument could possibly have merit if, post-1960, the courts resurrected reservations legislatively terminated for over 50 years. Such judicial action would have major consequences for the people residing in the area affected. These consequences do not exist here.

The legislative and judicial history of reservations opened for settlement does not support Respondent's historical analysis. The General Allotment Act contemplated the extinguishment of Indian titles or right to occupation of surplus lands within reservations and not the disestablishment of any part of the reservation. *Seymour v. Superintendent, supra,* 368 U.S. at 349-350; *Mattz v. Arnett, supra,* 412 U.S. at 496-497. B.R. at 27, 30, 32, 47, 84, 87; B.R. App. II at 159.

The original goal of the General Allotment Act was to reduce the Indian land estate and end the tribal relation. The Indians did not approve of these goals. In

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two years later in 1891. The materials have nothing to do with Congressional intent. The Tribune story excerpts are completely out of context; patching parts of statements of several people in a misleading way. B.R. at 17-18. The negotiation proceedings read in their entirety do not at all support Respondent's disestablishment conclusion. B.P. at 17-19. Both documents were prepared by non-Indians and the reliability of the translations from Sioux must also be questioned.

1906, Congress recognized the failure of the Act and amended it to continue the trust period and the reservation system. Act of May 8, 1906; c.2348, 34 Stat. 182. *United States v. Celestine,* 215 U.S. 278, 291 (1909); *Mattz v. Arnett, supra,* 412 U.S. at 496-497; B.P. at 36-37, fn. 26.

Seymour and *Mattz* do not invent new constructions of the General Allotment Act as amended. Rather, these decisions reaffirm this Court's early holdings which recognized continued reservation existence after allotment and "cession." *United States v. Celestine, supra; United States v. Nice,* 241 U.S. 591 (1916); *Ash Sheep Co. v. United States, supra.* If the Court had held in these cases that the General Allotment Act could not be construed consistently with reservation continuation, one would expect to find legislative and administrative history and enactments fatal to the position of the many tribes thereafter affected. In *Seymour* and *Mattz* no such history existed. Here, the trust period continues on the Lake Traverse Reservation, B.P. at 37-38, and recent enactments recognize the continued existence of the 1867 treaty reservation. From its creation, the Government has administered the area as a Federal Indian reservation. The tribal relations of Sisseton-Wahpeton Sioux Tribe members have never been severed and the tribal government is stronger today than at any other time in this century.

CONCLUSION

Congress has never terminated or reduced the original Lake Traverse Reservation. This Court should follow its holdings in *Seymour* and *Mattz*, reverse the judgment below and remaind with instructions to the court below to grant Petitioner's application for a writ of habeas corpus.

Respectfully submitted,

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December 9, 1974